Supreme Court, U.S.

86-2050

No.

FILED
AUG 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

HOWARD TRUCKING COMPANY, INC.

Petitioner

v.

JOHN A. STASSI, II, ARNOLD M. LUPIN, ALAN N. JACOBS, ERNEST E. CHERRIE, JR. and KENNETH N. ADATTO

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

MACK E. BARHAM
(Counsel of Record)
RALPH S. HUBBARD III
DAVID R. RICHARDSON
ROBERT E. ARCENEAUX
BARHAM & CHURCHILL
A Professional Law Corporation
400 Lafayette Street
Suite 300
New Orleans, Louisiana 70130
(504)523-3565
Counsel for Petitioner

Date: August 7, 1986

QUESTIONS PRESENTED FOR REVIEW

(1) WHETHER THE FULL FAITH AND CREDIT CLAUSE ALLOWS A STATE TO CONSTITUTIONALLY APPLY ITS OWN STATE LAW PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL TO DETERMINE THE EFFECT OF A FEDERAL COURT ORDER IN SUBSEQUENT, RELATED, STATE LITIGATION.

(2) WHETHER A BANKRUPTCY COURT ORDER REJECTING LEASES MAY BE IGNORED BY A STATE COURT IN A SUBSEQUENT STATE COURT PROCEEDING IN WHICH THE GUARANTORS OF THE BANKRUPT, WHO PARTICIPATED IN THE BANKRUPTCY REJECTION OF THE LEASES, ATTEMPT TO RECHARACTERIZE THE LEASES AS SALES.

LIST OF PARTIES

The Petitioner before this Court is Howard Trucking Co., Inc. Petitioner, Howard Trucking Company, Inc.'s, parent corporation is CINCO Corporation and is a sister corporation of Howard Construction Company.

The Respondents before this Court are John A. Stassi, II, Arnold M.Lupin, Alan N. Jacobs, Ernest E. Cherrie, Jr., and Kenneth N. Adatto.

TABLE OF CONTENTS

QUESTIONS PRESENTED -i-

LIST OF PARTIES -ii-

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

FEDERAL STATUTORY PROVISIONS INVOLVED 3

LOUISIANA STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT

I. LOUISIANA'S REFUSAL TO ACCORD FULL FAITH AND CREDIT TO FEDERAL COURT JUDGMENTS VIOLATES FEDERAL LAW, CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS, AND ENDANGERS FEDERAL DECISIONS INVOLVING PARTIES OVER WHICH LOUISIANA COURTS MAY LATER HAVE IN PERSONAM JURISDICTION. 11

A. Full faith and credit requires that federal law, not Louisiana law, governs the preclusive effects of federal court orders and judgments. 11

B. Louisiana's answer to full faith and credit: apply Louisiana law. 16

C. Louisiana's failure to adhere to the Full Faith and Credit clause warrants intervention by this Court. 21

II. THE DECISION BELOW HAS THE EFFECT OF MODIFYING THE SUBSTANCE OF A FEDERAL BANKRUPTCY COURT ORDER, RAISING IMPORTANT ISSUES AND PROBLEMS UNDER THE SUPREMACY CLAUSE. 23

CONCLUSION 28

APPENDIX

Opinion of the Supreme Court of Louisiana, March 31, 1986, affirming the lower court's entry of summary judgment 1a

Dissenting Opinion of Associate Justice Harry T. Lemmon, April 16, 1986 12a

Opinion of the Fifth Circuit Court of Appeal, June 3, 1985 (rehearing denied September 17, 1985), affirming trial court's entry of summary judgment 14a

Judgment of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, Honorable Alvin Rudy Eason, October 29, 1984, granting summary judgment 35a

Reasons for Judgment of the Twenty-Fourth Judicial District Court for the

Parish of Jefferson, Honorable Alvin Rudy Eason, October 29, 1984, granting summary judgment 37a

Judgment of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, Honorable Alvin Rudy Eason, May 9, 1984, denying summary judgment 42a

Minute Entry of the United States Bankruptcy Court, Eastern District of Louisiana, Judge Kingsmill, January 18, 1983, concerning lease versus sale of equipment 44a

News Release #49 of the Supreme Court of Louisiana denying rehearing, May 9, 1986 47a

TABLE OF AUTHORITIES

CASES

Alcantara v. Boeing Company, 705 P.2d 1212 (Wash.App. 1985) 14

Charter Oak Fire Insurance Company v. Sumitomo Marine and Fire Insurance Company, 750 F.2d 267 (3rd Cir. 1984) 19

Dudly v. Smith, 504 F.2d 979 (5th Cir. 1984) 20

Executive Car Leasing of New Orleans v. Alodex Corp., 265 So.2d 288 (La.App. 4th Cir. 1972), aff'd., 279 So.2d 169 (La.1972) 9

Freeman v. Lester Coggins Trucking Co., 771 F.2d 860 (5th Cir.1985) 13

General Foods v. Massachusetts Department of Health, 468 F.2d 784 (1st Cir. 1981) 19

Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir.1982) 13

Heiser v. Woodruff, 327 U.S. 726, 66 S.Ct. 853 (1946) 14

Herzog v. DesLauriers Steel Mould Company, 46 F. Supp. 211 (D.C.Pa.1942) 19

In re Weber, 674 F.2d 796 (9th Cir. 1982) cert. denied, 459 U.S. 1086, 103 S.Ct. 567 (1982) 24

Lake Country For Use and Benefit of Boxley v. Massachusetts Bonding and Insurance Company, 75 F.2d 6 (5th Cir. 1935) 19

Massachusetts Bonding and Insurance Company v. Denike, 92 F.2d 657 (3rd Cir. 1937) 18

Meinhard, Greeff and Company v. Brown, 199 F.2d 70 (4th Cir. 1952) 16

Myers v. Int'l. Trust Co., 263 U.S. 64, 44 S.Ct. 86 (1923) 21

Parsons Steel, Inc. v. First Alabama Bank, ____ U.S. ___, 106 S.Ct. 768 (1986) 22

Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134 (1938) 12, 15, 21

Viser v. Armstrong, 688 P.2d 796 (Okla.1984) 14

Walter E. Heller and Company v. Cox, 345 F.Supp. 519 (D.C.N.Y. 1972), aff'd., 486 F.2d 1398 (2nd Cir.1973), cert. denied, 414 U.S. 872, 94 S.Ct. 46 (1973) 18

Welch v. Crown Zellerbach Corporation, 359 So.2d 154 (La.1978) 16, 17

CONSTITUTIONAL PROVISIONS

U.S. Const. art. IV, Sec. 1. 3, 11

U.S. Const. art. VI, cl. 2 3, 24

FEDERAL STATUTORY PROVISIONS

28 U.S.C.A. 1738 (West) 3, 11, 23

LOUISIANA STATUTORY PROVISIONS

La.Rev.Stat.Ann. 13:4106 (West) 4, 8

MISCELLANEOUS

1B Moore's Federal Practice,
Secs. 0.406(1), 0.410(1), 0.419 (3-2)
(2d ed. 1984) 12, 15, 22

18 Wright and Miller, Federal Practice and
Procedure, Sec. 4468 (1981) 13, 14, 21

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

HOWARD TRUCKING COMPANY, INC.
Petitioner

versus

JOHN A. STASSI, II, ET AL

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

The Petitioner, Howard Trucking Co., Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Louisiana Supreme Court, entered in the above-entitled proceeding on March 31, 1986. Rehearing was sought before that court and denied on May 9, 1986.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court is reported at 485 So.2d 915, and is reprinted in the appendix hereto, at p. 1a, infra.

The opinion of the Fifth Circuit Court of Appeal for the State of Louisiana is reported at 474 So.2d 955, and is reprinted in the appendix hereto, at p. 14a, infra.

The second judgment and reasons for judgment of the Twenty-Fourth Judicial District Court of the State of Louisiana (Eason, J.) have not been reported. They are reprinted in the index hereto, at pp. 35a and 37a, infra.

The first judgment of the Twenty-Fourth Judicial District Court of the State of Louisiana (Eason, J.) has not been reported. It is reprinted in the index hereto, at p. 42a, infra.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Sec. 1257(3) to review a decision, involving a constitutional right, by the highest court in Louisiana rendered on March 31, 1986. Rehearing was sought by Petitioner and denied on May 9, 1986. See p. 47a, infra.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION
ARTICLE IV, SECTION 1.
Full Faith and Credit

Full faith and credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

UNITED STATES CONSTITUTION
ARTICLE VI, Clause 2
Supreme Law of the Land

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FEDERAL STATUTORY PROVISIONS INVOLVED
28 U.S.C. 1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory of Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be

proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

LOUISIANA STATUTORY PROVISIONS INVOLVED
La.Rev.Stat.Ann. 13:4106 (West)

If a mortgagee or other creditor takes advantage of a waiver of appraisement of his property, movable, immovable, or both, by a debtor, and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property was sold, the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor. The mortgagee or other creditor shall not have a right thereafter to proceed against the debtor or any of his property for such deficiency, except as provided in the next paragraph.

If a mortgage or pledge affects two or more properties, movable, immovable, or both, the judicial sale of any property so

> affected without appraisement shall not prevent the enforcement of the mortgage or pledge in rem against any other property affected thereby.

STATEMENT OF THE CASE

Petitioner, Howard Trucking Company, Inc. ("Howard Trucking"), is a trucking company which provides, among other things, equipment and services for oilfield hauling operations. Respondents were the sole shareholders of Orleans-Iberia, Inc. ("Orleans-Iberia") prior to its dissolution, and are the guarantors of certain contracts made between Howard Trucking and Orleans-Iberia.

In the summer of 1981, John M. Howard, Howard Trucking's President, decided to sell certain oilfield equipment at public auction. Instead, the Respondents persuaded Howard to cancel the auction plans and sell the equipment to Orleans-Iberia. John Stassi, II, an agent of Orleans-Iberia and one of the Respondents, structured the transaction as a series of leases in order to obtain the best tax advantage. Howard acquiesced in this arrangement.

As a consequence of the characterization of the contracts as leases, standard lease provisions were included in the contracts granting Howard Trucking the right to collect liquidated damages upon default. The liquidated damages were specified to be all proceeds received by Howard Trucking from a sale, public or private, of the equipment plus the "present value of the rentals remaining unpaid for the lease term . . . ." The Respondents signed guaranty agreements wherein they personally bound themselves to underwrite Orleans-Iberia's obligation under the leases, including Orleans-Iberia's obligation on default.

Within three months of signing the leases, Orleans-Iberia was in arrears in its payments, and on October 14, 1982, it filed a petition under Chapter 11 of the Bankruptcy Act. Exhibit B to the debtor's petition contained a "STATEMENT OF DEBTOR'S ASSETS." The first asset listed was:

> 1) **Leasehold** interests in various motor vehicles and related equipment in Schedule attached to **equipment lease** attached hereto.

(emphasis added). The same exhibit described "Debtor's Nature of Business" as follows:

> Debtor **leases** the motor trucks, trailers and related equipment from Howard Trucking Company, Inc. as per Schedule "A-1." and leases said equipment back to Howard Trucking Company, Inc. by owner-operator agreements pursuant to which Howard operates the equipment in connection with its business as a common carrier for hire.

(emphasis added). The equipment itself was not listed as an asset of the debtor, because Orleans-Iberia merely leased it and did not own it. At the first meeting of creditors, John Stassi reiterated Orleans-Iberia's lack of ownership of the leased equipment when he stated, "We have the title to none of the vehicles, we only have a lease rights with options to purchase if we pay out the lease."

Howard Trucking obtained an order from the bankruptcy court, Judge T.H. Kingsmill, Jr., presiding, rejecting the leases and sending Howard Trucking into immediate possession of the property which was the subject of the rejected leases. In reaching his decision to reject the leases, Judge Kingsmill considered "the statements of counsel, the

testimony of John Stassi as president of the debtor corporation, the evidence and the law . . . ." See bankruptcy court minute entry, at p. 44a, infra. Judge Kingsmill's ruling was never appealed. Eventually, the bankruptcy case was closed and Orleans-Iberia was dissolved.

Meanwhile, Howard Trucking sold the equipment in order to minimize its losses, and filed suit in state court against Respondents on their guaranties for the liquidated damages specified in the leases less the sale proceeds. Respondents answered and raised as an affirmative defense Louisiana's Deficiency Judgment Act.[1]

Because the requirements of that Act only apply to judicial sales invoked by foreclosure, and not to private sales of leased property (where title

---

[1]The Deficiency Judgment Act, La.Rev.Stat.Ann. 13:4106 (West), provides that a foreclosure sale of a debtor's property conducted without the benefit of appraisal discharges the debtor of his obligation regardless of whether the sales proceeds are otherwise sufficient to satisfy the full amount of the debt.

remains in the lessor),[2] the Respondents alleged for the first time that the transactions, which they had engineered, were not at all leases, but were in fact conditional (financed) sales. Respondents then filed a motion for summary judgment alleging that the contracts were sales and not leases as a matter of law.

Howard Trucking responded, arguing, inter alia, to the Louisiana courts that the issue of whether the transactions were leases or sales was res judicata, relying on the bankruptcy court pleadings and order, and that the guarantors were collaterally estopped from relitigating the issue. The district court's first judgment correctly denied Respondents' motion for summary judgment. See p. 42a, infra. Respondents filed a second motion for summary judgment, asserting the same claim, which was granted. See, p. 35a, infra.

---

[2]See Executive Car Leasing of New Orleans v. Alodex Corp., 265 So.2d 288 (La.App. 4th Cir. 1972), aff'd., 279 So.2d 169.

Howard Trucking appealed this decision, claiming that Judge Kingsmill's disposition of the property and leasehold interests was entitled to full faith and credit by the Louisiana courts and that Respondents were prohibited from collaterally attacking that federal court order. The Louisiana Fifth Circuit Court of Appeal curtly dismissed this argument stating, "Our jurisprudence clearly states Louisiana law does not recognize the doctrine of collateral estoppel." See p. 31a, infra.

Believing that federal, not Louisiana, principles of collateral estoppel and res judicata should apply to determine the effect of a federal court decision, Howard Trucking sought and obtained review by the Louisiana Supreme Court, again arguing that Judge Kingsmill's order was entitled to full faith and credit. That court affirmed the court of appeal decision, applying solely Louisiana law. See p. 1a, infra. Rehearing was sought and denied. Thus, Petitioner comes before this Court to preserve the rights granted to it by the federal bankruptcy judge.

I. LOUISIANA'S REFUSAL TO ACCORD FULL FAITH AND CREDIT TO FEDERAL COURT JUDGMENTS VIOLATES FEDERAL LAW, CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS, AND ENDANGERS FEDERAL DECISIONS INVOLVING PARTIES OVER WHICH LOUISIANA COURTS MAY LATER HAVE IN PERSONAM JURISDICTION.

A. Full faith and credit requires that federal law, not Louisiana law, governs the preclusive effects of federal court orders and judgments.

Article IV, Section 1 of the Constitution of the United States requires that full faith and credit be given in each state to the public acts, records, and judicial proceedings of every other state, and the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. The power granted Congress to implement the Full Faith and Credit Clause was exercised in 1790, and remains in principle unchanged:

> Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such state, territory, or possession from which they are taken.

28 U.S.C. 1738.

It is an integral requirement of the Full Faith and Credit Clause that a state court's determination of the claim or issue preclusive effects of a federal judgment is to be governed by **federal law.** That fact is recognized by the Restatement (Second) of Judgments in Section 87. Professor Moore has observed that:

> Sec. 1738 requires in short that **to the extent that a judgment precludes further litigation in the jurisdiction in which it was rendered, it precludes further litigation elsewhere.**

1B Moore's Federal Practice, Sec. 0.406[1], at pp. 267-68 (2d Ed. 1984) (emphasis added). He further observes that this rule of law is "unexceptionable." See 1B Moore, supra, Sec. 0.410[1], at p. 362.

Rule 87 of the Restatement (Second) of Judgments and Professor Moore's observations regarding it rest on solid and uncontradicted federal jurisprudence. A federal judgment is to be given the same preclusive effect by a state court that it would have in federal court, necessarily requiring the state to apply federal principles of res judicata or collateral estoppel. See Stoll v. Gottlieb, 305

U.S. 165, 170, 59 S.Ct. 134, 137 (1938); Freeman v. Lester Coggins Trucking Co., 771 F.2d 860, 862 (5th Cir. 1985), Tate J., ("Federal law determines the res judicata and collateral effect given a prior decision of a federal tribunal, regardless of the basis of the federal court's jurisdiction."); Hardy v. Johns-Manville Sales Corporation, 681 F.2d 334, 337 (5th Cir. 1982) ("The principle of finality essential to a court's authority demands that federal law determine the effects under the rules of res judicata of a judgment of a federal court.").

Professors Wright and Miller observe that the suggestion that state courts need not apply federal law to determine the preclusive effects of a federal judgment is "so unthinkable that the rule requiring state courts to honor the res judicata effects of federal court judgments has been stated in an unbroken line of cases . . . ." 18 Wright and Miller, Federal Practice and Procedure, Sec. 4468, p. 649 (1981). They opine that the federal decisions are based on a variety of grounds: federalism, full faith

and credit, comity, federal question, or merely res judicata.

State courts, as well as federal courts, have realized that the Full Faith and Credit Clause requires that preclusive effects of federal judgments be decided by principles of federal law. See, e.g., Viser v. Armstrong, 688 P.2d 796 (Okla. 1984); Alcantara v. Boeing Co., 705 P.2d 1222 (Wash. App. 1985). Wright and Miller observe that "state courts generally recognize the obligation to honor federal judgment without cavil," and that "defiance, or the much more probable failure to guess right at the content of federal rules," is corrected by a direct review to the United States Supreme Court. See Wright and Miller, supra, at p. 659.

The above and foregoing rules have been applied directly to decisions and judgments emanating from the bankruptcy courts. Such judgments are unquestionably entitled to full faith and credit. This Court observed in Heiser v. Woodruff, 327 U.S. 726, 733, 66 S.Ct. 853, 856 (1946), that the effect to be given in both state and

federal courts to a plea of res judicata arising from decrees of a bankruptcy court is to be decided by federal rules of res judicata. See also Stoll v. Gottlieb, supra. As Professor Moore has observed:

> In brief, then, judgments of the bankruptcy court were normally immune to collateral attack. They could be relied upon by state courts. And when the judgment was final and valid it should be given appropriate res judicata or collateral estoppel effect in a state court; and was there entitled to full faith and credit. . . . The enactment of the Bankruptcy Code in 1978 does not alter these principles nor are they altered by the simultaneous amendment of Title 28 to expand the jurisdiction of bankruptcy courts. Until April 1, 1984, the effective date of the provisions of new Chapter 6 of Title 28, creating the United States Bankruptcy Courts as courts of record adjunct to the district courts, the bankruptcy jurisdiction is placed in the district courts and the judgments in bankruptcy courts, as an exercise of this jurisdiction remain judgments of a court of authority and are entitled to the same respect and governed by the same principles of judicial finality as other judgments of the district courts.

1B Moore, supra, Sec. 0.419[3.-2], at pp. 643-44. Thus, "the allowance of a claim in bankruptcy operates ordinarily to estop the claimant as to all matters which were or should have been included in

the claim." Meinhard, Greeff and Company v. Brown, 199 F.2d 70, 74 (4th Cir. 1952).

B. Louisiana's answer to full faith and credit: apply Louisiana law.

The Louisiana Supreme Court opinion below briefly dismissed Howard Trucking's claim of collateral estoppel by noting that reliance on the doctrine was "misplaced." The Court cited Welch v. Crown Zellerbach Corporation, 359 So. 2d 154 (La. 1978), a case which turned on the uniqueness of Louisiana issue and claim preclusion law and ultimately rejected the common law doctrine of collateral estoppel as inconsistent with Louisiana's civilian heritage. The Fifth Circuit Court of Appeal opinion below foreshadowed the Supreme Court's holding with stronger language: "Our jurisprudence clearly states Louisiana law does not recognize the doctrine of collateral estoppel." See p. 31a, infra.

While Louisiana may have rejected collateral estoppel as a preclusive effect which flows from its judgments, collateral estoppel is recognized by

federal courts, and is one of the effects which flows from federal judgments. As such, the Louisiana courts were bound to give full faith and credit to Judge Kingsmill's order by considering whether it collaterally estopped Respondents from arguing that the contracts at issue were sales instead of leases. Louisiana's disdain for collateral estoppel cannot change its constitutional mandate.

The rejection below of Howard Trucking's plea of res judicata also unquestionably represents an unprecedented and unexplained departure from the uncontrovertible principles of full faith and credit discussed above. Relying upon Louisiana law for a listing of the elements of res judicata, and again citing Welch v. Crown Zellerbach Corporation, supra, the Supreme Court held that Howard Trucking Company's plea of res judicata was "ill-founded" because the Respondents in this case "were not parties to the bankruptcy proceedings and do not stand in the same quality as the debtor." See p. 7a, infra. The court's ruling may have been, under Louisiana law, ultimately correct because

Louisiana's stringently applied doctrine of res judicata does not allow for any deviation in the identity of the parties involved, even if the parties in the second suit were privies to the first proceeding.

However, under federal law, a "non-party" may be precluded from relitigation by the conclusive force of a judgment under several situations which may not qualify under Louisiana res judicata rules. Relevant to the case at hand are the federal rules regarding sureties and "virtual representation," whereby a party who actually participates in the defense or prosecution of a suit is bound by a decision rendered therein.

With regard to sureties, federal law provides that "a guarantor is bound by a prior adjudication involving the principal debtor if the guarantor had notice of and an opportunity to participate in the prior proceeding." Walter E. Heller and Company v. Cox, 345 F.Supp. 519, 524 (D.C.N.Y. 1972), aff'd., 486 F.2d 1398 (2d Cir. 1973), cert. denied, 94 S.Ct. 46, 414 U.S. 827. See also Massachusetts Bonding

and Insurance Company v. Denike, 92 F.2d 657, 658 (3d Cir. 1937); Lake Country for Use and Benefit of Boxley v. Massachusetts Bonding and Insurance Company, 75 F.2d 6, 8 (5th Cir. 1935); Herzog v. DesLauriers Steel Mould Company, 46 F.Supp. 211, 213 (D.C. Pa. 1942).

Federal courts also bind those who are "virtually represented" by parties to litigation. "A person who is not a party to an action but who expressly or impliedly gives a party authority to represent him may be bound by the rule of res judicata as though he were a party." General Foods v. Massachusetts Department of Public Health, 468 F.2d 784, 787 (1st Cir. 1981). Simply put, "litigating non-parties simply are not 'strangers to the cause.' " Charter Oak Fire Insurance Company v. Sumitomo Marine and Fire Insurance Company, 750 F.2d 267, 270 (3d Cir. 1984), citing Montana v. United States, 440 U.S. 147, 154, 99 S.Ct. 970, 974, 59 L.Ed. 2d 210 (1979). As the Charter Oak court observed:

> The Supreme Court has stated that "one who prosecutes or defends a suit in the name of another to establish and protect

> his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record." Souffront v. Compangie Des Sucreries, 217 U.S. 475, 487, 30 S.Ct. 3608, 612, 57 L.Ed. 846 (1910).

750 F.2d at 270. See also Dudly v. Smith, 504 F.2d 979 (5th Cir. 1984).

The courts below, by prematurely terminating this suit on motion for summary judgment, failed to award Judge Kingsmill's order full faith and credit. John Stassi, who participated directly in the bankrupcty proceeding, was unquestionably, under federal law, a "party" to that proceeding. The remaining Respondents, who were the shareholders of Orleans-Iberia, may well have been "parties" to the bankruptcy proceeding, as may be established at trial on the merits. The opinions below, by not recognizing that fact, have established precedent in Louisiana that allows its courts to choose their own unique law of res judicata, jeoparding the rights of future litigants who obtain a federal judgment but fail to meet Louisiana's unique and stringent

requirements for res judicata when that judgment is collaterally attacked in state court.

C. Louisiana's failure to adhere to the Full Faith and Credit clause warrants intervention by this Court.

This Court has granted writs of certiorari in the past to determine whether full faith and credit was given to a federal court judgment. See, e.g., Stoll v. Gottlieb, supra; Myers v. International Trust Company, 263 U.S. 64, 44 S. Ct. 86 (1923). See generally Wright and Miller, supra, at p. 651 (The United States Supreme Court has "consistently adhered to the proposition that it has the jurisdiction to review state decisions that deal with the res judicata effects of federal judgments."). State courts should not be allowed to flout federal decisions and allow parties to relitigate issues previously resolved by a federal tribunal. Given the unique nature of Louisiana law regarding issue and claim preclusion, application of the Louisiana criteria for res judicata to protect federal

judgments is no protection at all. Even worse is the Louisiana court's denial that collateral estoppel can exist within its sovereign boundaries when the basis of such a claim is the preclusive effect of a federal judgment.

Barring review by this Court, there is no other procedural safeguard available to prevent the Louisiana courts from denying full faith and credit to federal judgments except by injunction. However, injunctive relief is only available if it is sought and obtained prior to the submission of the plea of issue or claim preclusion to the state court. As this Court has held:

> Challenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court. See Angel v. Bullington, 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947).

Parsons Steel, Inc. v. First Alabama Bank, ___ U.S. ___, ___, 106 S. Ct. 768, 773 (1986). See also 1B Moore, supra, at p. 275.

If the judgment below stands uncorrected, the federal district courts may well be flooded with "Petitions for Injunctive Relief" because litigants are now aware that they will not receive protection from claim or issue relitigation from the Louisiana state courts. This outcome is apodictic given Louisiana's blatant failure to follow the explicit mandate of the Full Faith and Credit Clause of the United States Constitution, the federal statute enacted pursuant thereto (28 U.S.C. 1738), and the overwhelming wealth of federal jurisprudence interpreting and applying both of these provisions.

II. THE DECISION BELOW HAS THE EFFECT OF MODIFYING THE SUBSTANCE OF A FEDERAL BANKRUPTCY COURT ORDER, RAISING IMPORTANT ISSUES AND PROBLEMS UNDER THE SUPREMACY CLAUSE.

Acting under the grant of authority found in Article I, Sec. 8, clause 4 of the United States Constitution, Congress enacted the Bankruptcy Act in 1898. The current federal bankruptcy law is embodied in the Bankruptcy Code of 1978. By virtue

of Article VI, clause 2 of the Constitution, the Bankruptcy Code is the supreme law of the land, binding on all state judges and tribunals. That law is not merely procedural, but affects substantive rights as well. It can even impair the sacred state law of contracts. See In re Weber, 674 F.2d 796 (9th Cir.1982), cert. denied, 459 U.S. 1086, 103 S.Ct. 567.

The Bankruptcy Code is designed to provide a framework within which financially troubled debtors can either reorganize or liquidate their holdings as may be appropriate under the circumstances. Whatever the resolution of the debtor's financial problems, it must be a permanent one, binding on the debtor and his creditors.

During the pendency of bankruptcy proceedings, the bankruptcy court has exclusive jurisdiction over all property of the debtor's estate. That court has the power to and does, in fact, make numerous rulings affecting the status and disposition of such property. Not only debtors, but creditors and other interested parties must be able to rely on

the rulings of the bankruptcy courts if the Bankruptcy Code is to have any force and effect whatsoever.

In Louisiana, the state Supreme Court has asserted that it is free to alter or ignore the final ruling of the federal bankruptcy judge — a holding by that court which flies in the face of the United States Constitution itself. The judgment of the court below sets the dangerous precedent, not only of ignoring rulings of the bankruptcy courts, but of disregarding judgments of all federal courts. This Honorable Court cannot allow such a practice to spread, perhaps even beyond the boundaries of the State of Louisiana, but must call it to a halt.

If state courts are allowed to ignore rulings of bankruptcy courts and to consider de novo issues already resolved in an appropriate federal forum, debtors and creditors, at the very least, will be unable to rely on the protections afforded by the

bankruptcy code.[3] They will have to alter their behavior to take into account all possible contingencies of both federal and state law. Such a result was not envisioned by Congress, nor contemplated by the Bankruptcy Code.

The facts of the instant case exemplify the impact of reliance on a federal bankruptcy court order only to find it rendered impotent in state court. Howard Trucking obtained an order

---

[3] The suggestion in footnote five at p. 6a, infra, of the Supreme Court's opinion that the Respondents may not be collaterally attacking the bankruptcy court judgment of January 18, 1983 because Judge Kingsmill could have rejected the contracts at issue as "executory contracts" is simply incorrect and underscores why the Louisiana courts should not be allowed to undo the effects of a bankruptcy adjudication. Installment sales, whether conditional or not, do not constitute executory contracts and cannot be rejected under 11 U.S.C. 365. See In the matter of Rojas, 10 B. R. 353 (Bank. App. 9th Cir. 1981); In the matter of Shada Truck Leasing, Inc., 31 B.R. 97 (Bank. Neb. 1983); In the matter of Rose, 21 B. R. 272 (Bank. N.J. 1982) (the weight of authority is that the mere repayment of money pursuant to an installment sales contract, where the goods have been delivered, is not to be characterized as an executory contract for the purposes of the Bankruptcy Code); In the matter of Booth, 19 B. R. 53 (Bank. Utah 1982).

characterizing the contracts as leases and recognizing its title in the equipment. Believing that it was the owner, Howard Trucking sold the equipment to minimize its losses from dealing with the Respondents. Had Howard Trucking anticipated that the Louisiana courts would ignore the order recharacterizing the contracts as sales, it would have behaved differently. In order to protect its rights and comply with the Deficiency Judgment Act, it would have had to provoke a judicial sale of the trucks. Because Louisiana has no procedure for selling one's own property at a sheriff's sale, Howard Trucking would necessarily have had to take a completely different posture in the bankruptcy proceeding. It would have had to either apply to have the automatic stay lifted or to have sought to have the trucks abandoned so that a foreclosure could occur in state court. These alternatives were not pursued because Howard Trucking had the reasonable belief that a judgment of the bankruptcy court returning the trucks to their owner could not be ignored in state court. Howard Trucking's belief

was entirely reasonable given the Supremacy Clause of the United States Constitution.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner has foregone its right to injunctive relief, erroneously believing that the Louisiana Supreme Court would give full faith and credit to the bankruptcy court order. This Honorable Court is the last resort of Petitioner to protect its right to rely on a federal judgment and to protect others from Louisiana's officious intermeddling in federal dispositions.

Respectfully submitted,

MACK E. BARHAM
(Counsel of Record)
RALPH S. HUBBARD III
DAVID R. RICHARDSON
ROBERT E. ARCENEAUX
BARHAM & CHURCHILL
A Professional Law Corporation
400 Lafayette Street
Suite 300
New Orleans, Louisiana 70130
(504)523-3565

Date: August 7, 1986

APPENDIX

APPENDIX

SUPREME COURT OF LOUISIANA

No. 85-C-1972

HOWARD TRUCKING COMPANY, INC.

Versus

JOHN A. STASSI II, ARNOLD M. LUPIN, ALAN N. JACOBS, ERNEST E. CHERRIE, JR. and KENNETH N. ADATTO

On Writ of Certiorari, or Review, to the Court of Appeal, Fifth Circuit, Jefferson Parish, Louisiana

DIXON, Chief Justice

For forty-six monthly payments of $3489.42 plaintiff, Howard Trucking Company, Inc., agreed on October 5, 1981 to transfer certain vehicles and oil field hauling equipment to Orleans-Iberia, Inc. At Orleans-Iberia's insistence the agreement was styled a lease; it contains the ordinary clauses governing the parties' rights in the event of default.[1]

---

[1]Paragraph 19 provides: "The Lessor may, without notice, but shall not be obligated to, sell all or any portion of the leased Equipment, at public or private

The closing memorandum signed by the parties two days later provided for an additional cash down payment of $275,000 and a $100 option to purchase at the end of the term. Defendants, shareholders of Orleans-Iberia, each executed documents guaranteeing Orleans-Iberia's liabilities and obligations to Howard Trucking under this and six similar agreements.

Several months after the agreements were entered Orleans-Iberia fell behind in monthly

---

Footnote 1 Concludes:

sale, upon such terms as it may deem advisable, and in the event of any such sale the Lessor shall, in addition to other rights and remedies hereunder, be entitled to retain as liquidated damages and not as penalty all proceeds of such sale, and to recover from the lessee as additional rents any deficiency with respect to the leased Equipment sold, determined as provided in paragraph 16. . . ."

Paragraph 16 provides: "If the net sales proceeds from the sale of any Equipment . . . are less than the present value of rentals remaining unpaid for the lease term plus the Residual Value specified herein, and plus any other obligations of Lessee to Lessor hereunder, the Lessee shall promptly pay such amount to Lessor as additional rent. . . ."

payments and on October 14, 1982 it filed a Chapter 11 petition in bankruptcy.[2] On Howard's Trucking's motion the contracts were ordered rejected by the bankruptcy judge. Howard Trucking regained possession of the equipment, advertised it nationally, and on March 2, 1983 sold it at nonjudicial sale without appraisement. After deducting expenses and commissions, Howard Trucking realized $491,841.12 from the sale.

Claiming $950,000 in past due and accelerated rent, Howard Trucking sued the defendant

---

[2]Among assets listed were: "1 -Leasehold interests in various motor vehicles and related equipment reflected in schedule attached to equipment lease attached hereto. . . ." It described its business as follows: "Debtor leases the motor trucks, trailers and related equpment from Howard Trucking Company, Inc. as per Schedule 'A-1,' and leases said equipment back to Howard Trucking Company, Inc. by owner-operator agreements pursuant to which Howard operates the equipment in connection with its business as a common carrier for hire. Debtor derives the gross income from the hire of said equipment by Howard less expenses relative thereto and is obligated to pay Howard a fixed monthly out of the net operating profit. As of September 20, 1982, Debtor, due to lack of resources and an unwillingness of Howard to advance funds, was forced to curtail its business activities."

guarantors. The trial judge found the contracts entered between Howard Trucking and Orleans-Iberia to constitute conditional sale agreements, found that Howard Trucking had failed to comply with the requirements of the rent Deficiency Judgment Act, R.S. 13:4106-07,[3] and granted defendants' motion for summary judgment. That

---

[3]Section 4106 provides: "If a mortgagee or other creditor takes advantage of a waiver of appraisement of his property, movable, immovable, or both, by a debtor, and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property was sold, the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor. The mortgagee or other creditor shall not have a right thereafter to proceed against the debtor or any of his other property for such deficiency, except as provided in the next paragraph.

"If a mortgage or pledge affects two or more properties, movable, immovable, or both, the judicial sale of any property so affected without appraisement shall not prevent the enforcement of the mortgage or pledge in rem against any other property affected thereby."

Section 4107 provides: "R.S. 13:4106 declares a public policy and the provisions thereof can not, and shall not be waived by a debtor, but it shall only apply to mortgages, contracts, debts or other obligations made, or arising on or after August 1, 1934."

judgment was affirmed on appeal, Howard Trucking Co., Inc. v. Stassi et al., 474 So.2d 955 (La.App. 5th Cir. 1985), and is now before this court on a writ of review. 478 So.2d 1229 (La.1985). We affirm.

At the outset the contention advanced by Howard Trucking that Act 592 of 1985[4] bears on this dispute must be rejected. While the act purports to apply retroactively, it would apply in any event only "to leases of movables in existence as of the effective date of this Act." Id., Sec. 7. Act 592 took effect on July 13, 1985. The agreement between Howard Trucking and Orleans-Iberia terminated when Howard Trucking took possession

---

[4]This act amends and reenacts the lease of movables statute, R.S. 9:3301 et seq. Section 3310(B) states: "Financed leases subject to this Chapter shall have the same legal affect as true leases for purposes of Louisiana law notwithstanding the fact that financed leases of movable property have been previously construed in Louisiana as completed credit sales or conditional sales transactions. The lessor under a financed lease subject to this Chapter shall retain full legal and equitable title and ownership in and to the leased equipment until such time as the lessee exercises his option or complies with his obligation to purchase the leased equipment from the lessor as provided under the lease agreement . . . . "

of the subject equipment in January of 1983, if not before. Without question that agreement did not exist as of the effective date of this statutory reenactment.

Howard Trucking argues that the district judge was constrained by the doctrines of res judicata and collateral estoppel to accept the federal bankruptcy judge's designation of the contracts as leases,[5] that

---

[5]It is not so obvious to us as it was to the court of appeal that the trustee's decision to reject the agreement necessarily rests on its designation as a lease. 11 U.S.C. Sec. 365 authorizes rejection of "executory contracts or unexpired leases." The Fifth Circuit Court of Appeals has adopted a definition of executory contract which might be read to include a conditional sale agreement: "... a contract is executory when something remains to be done by one or more of the parties. An executory contract is one in which a party binds himself to do or not do a particular thing, whereas an executed contract is one in which the object of the agreement is already performed ..." In re American Magnesium Co., 488 F.2d 147,152 (5th Cir.1974), rehearing en banc denied, 491 F.2d 1272 (1974).

See also, In the Matter of Jackson Brewing Co., 567 F.2d 618,623 (5th Cir.1978), where the court quotes from 6 Collier on Bankruptcy, Sec. 2.11: "'All that the term implies is that the contract is not completely 'executed', that something remains to be done.

the Deficiency Judgment Act does not apply to leases, cf. Executive Car Leasing Co. of New Orleans, Inc. v. Alodex Corp., 279 So.2d 169, 172 (La.1973), and that summary judgment was therefore improperly rendered against it. In our view these arguments are ill-founded. Invocation of res judicata requires (1) an identity of the parties, (2) an identity of "cause" and (3) an identity of the thing demanded. C.C. 2285-87; 3556 (31). The absence of any of these identities is fatal to the plea. Welch v. Crown Zellerbach Corp., 359 So.2d 154, 156 (La.1978). Because the guarantors were not parties to the bankruptcy proceedings and do not stand in the same quality as the debtor, the order of the bankruptcy judge does not have preclusive effect as

---

[5] concludes:

Contracts are executed or executory. A contract is executed where everything that has to be done is done, and nothing remains to be done . . . An executory contract is one where it is stipulated by agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both the parties. . .'"

to them. Reliance on the doctrine of collateral estoppel is likewise misplaced. Id. at 156-57.

Howard Trucking contends in the alternative that the guarantors should be "equitably estopped" from recharacterizing the agreements as contacts of sale. "Estoppel" in its various forms seems to be a doctrine of last resort. In Louisiana, no statutory material and no body of jurisprudence justifies its use. In this court we have discussed it, in modern times, only to disallow a claim that the opponent ought not to be able to make a certain claim or defense. John Bailey Contractor, Inc. v. State, 439 So.2d 1055 (La.1983); Welch v. Crown Zellerbach Corp., supra; State v. Mitchell, 337 So.2d 1186 (La.1976); Wilkinson v. Wilkinson, 323 So.2d 120 (La.1975). The court of apeal correctly noted that Howard Trucking knew all the factual circumstances underlying the transaction. Whether the contract was a lease or a sale does not depend on what defendants called it.

Relying on C.C. 1853,[6] Howard Trucking argues that the defendants are bound by their "confession" in the bankruptcy court that the agreements are leases and not contracts of sale. A judicial admission or confession is the express acknowledgment of adverse fact. Crawford v. Deshotels, 359 So.2d 118, 122 (La.1982). Questions of law cannot be confessed or admitted; the characterization of the contracts in issue is preeminently of that nature. Article 1853 has no application to this case.

Howard Trucking contends that because the parties intended the agreements to be leases they are leases in law. C.C. 2045.[7] It is true the intent

---

[6] Article 1853 provides: "A judicial confession is a declaration made by a party in a judicial proceeding. That confession constitutes full proof against the party who made it.

"A judicial confession is indivisible and it may be revoked only on the ground of error of fact."

[7] Article 2045 provides: "Interpretation of a contract is the determination of the common intent of the parties."

of the parties to a contract should govern its interpretation. Pastorek v. Lanier Systems Co., 249 So.2d 224 (La. App. 4th Cir. 1971) (Lemmon, J.), on which the lower courts relied, is not to the contrary.

The record shows that the parties treated the contracts in the present case as leases for some purposes and as sales for other purposes. That they were designated and treated as leases for federal tax purposes is insufficient to defeat the motion for summary judgment. Rather, the best evidence of the parties' intent is what the parties agreed to do. Orleans-Iberia agreed to make a down payment of $275,000 and to make forty-six monthly payments of $3489.42, at 16.7% interest. The total of the payments equals the value of the equipment. The parties agreed upon a $100 option to purchase at the end of the term. Orleans-Iberia was required to pay the full value of the equipment regardless of whether it exercised that option. On these facts, the trial judge did not err in concluding as he did:

> "In this case the residual value was paid in advance rather than at the end of the lease, so that it is the thinnest disguise for a down payment. The so called lease payments are clearly installments and the $100.00 option to purchase this very valuable equipment does not obscure the fact that this is a conditional sale agreement."

Howard Trucking's final contention is that its efforts to advertise nationally and obtain the best possible price for the equipment absolves it from failure to comply with the Deficiency Judgment Act. Section 4106 embodies a firm public policy of this state and requires strict adherence. Appraisal cannot be waived, even by consent of the debtor. We decline to override the long and consistent line of jurisprudence finding appraisal an absolute prerequisite to a deficiency judgment.[8]

The trial judge correctly entered summary judgment in favor of the defendants; the judgment is affirmed at plaintiff's cost.

---

[8] Exchange National Bank of Chicago v. Spalitta, 321 So.2d 338, 341 (La.1975), cert. denied, 425 U.S. 904 (1976), is not in [sic] point. It involved a Chapter 10 proceeding and 11 U.S.C. Sec. 502, which exempts sales in such proceedings from the necessity of appraisal.

SUPREME COURT OF LOUISIANA

NO. 85-C-1972

HOWARD TRUCKING COMPANY, INC.

versus

JOHN A. STASSI II, ARNOLD M. LUPIN, ALAN N. JACOBS, ERNEST E. CHERRIE, JR. and KENNETH N. ADATTO

JUSTICE LEMMON, Dissenting

Defendant shareholders demanded that the agreement be styled a lease and accepted the tax benefits of that characterization. The corporation then declared in the bankruptcy petition that the property was leased.

Howard Trucking, acting in reliance on these actions of the shareholders, treated the property as leased property by taking possession and selling the property at a private sale. Now, when it is to their benefit to change their position in order to defeat an attempt to collect the balance of the debt, the shareholders contend in this action that the agreement was really a sale and that the Deficiency

Judgment Act applies. Certainly these circumstanaces call for the application of some form of estoppel.

This case illustrates the problems created by the decision in Welch v. Crown Zellerbach Corp., 359 So.2d 154 (La.1978), which adopted the absolutely rigid position that narrowly defined res judicata is the only procedural device which can be used to preclude relitigation of issues which have already been judicially determined. By adhereing [sic] to this inflexible attitude, this court now allows a party to a contract to change its position as the winds of benefit change, without regard to the detriment to the other contracting party who acted in reliance on the position originally adopted. This attitude disregards the fundamental concepts of balancing which are the very essence of the judicial process.

HOWARD TRUCKING CO., INC. NO. 85-CA-48
Consolidated With
VERSUS NO. 85-CA-49

JOHN STASSI, II, ARNOLD M. LUPIN, ALAN N. JACOBS, ERNEST E. CHERRIE, JR. AND KENNETH N. ADATTO COURT OF APPEAL
FIFTH CIRCUIT
STATE OF LOUISIANA

APPEAL FROM THE TWENTY-FOURTH
JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 273-546 CONSOLIDATED WITH NO. 273-547
HONORABLE ALVIN RUDY EASON, JUDGE

CHARLES GRISBAUM, JR.

JUDGE

(Court composed of Judges Lawrence A. Chehardy, H. Charles Gaudin, and Charles Grisbaum, Jr.)

RALPH S. HUBBARD III
DAVID R. RICHARDSON, for plaintiff-appellant
BARHAM & CHURCHILL
400 Lafayette Street, Suite 300
New Orleans, Louisiana 70130

LAWRENCE D. WIEDEMANN, for defendant-appellee
WIEDEMANN & FRANSEN
821 Baronne Street
New Orleans, Louisiana 70130

WILLIAM R. FORRESTER, JR.
ROGER A. STETTER, for defendants-appellees
LEMLE, KELLEHER, KOHLMEYER, HUNLEY,

MOSS & FRILOT
21st Floor, Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130

AFFIRMED

This is an appeal from a summary judgment in favor of the defendants. We affirm.

We are called upon to determine the following issues:

(1) whether the trial court erred in finding there was no genuine issue of material fact;

(2) whether the trial court erred, as a matter of law, in holding that the doctrine of res judicata was inapplicable and in failing to invoke either the doctrine of collateral estoppel or equitable estoppel; and

(3) whether the trial court erred in finding the prior judicial confessions did not estop the defendants from claiming the agreement entered into by the parties was in the nature of a sale and not of lease.

This action arises out of a continuing guarantee agreement executed by the defendants/appellees, John Stassi II, Arnold M. Lupin, Alan N. Jacobs, Ernest E. Cherrie, Jr., and Kenneth A. Adatto, in favor of the plaintiff/appellant Howard Trucking Company, Inc.

guaranteeing the obligations of Orleans-Iberia, Inc. The obligations arise, according to the plaintiff, under a series of leases of oil-field hauling equipment by Howard Trucking to Orleans-Iberia. Subsequent to the making of this agreement, Orleans-Iberia was authorized to be dissolved by the Bankruptcy Court for the Eastern District of Louisiana, on November 16, 1983, with no distribution to its creditors.

The events leading to the present lawsuit began in the summer of 1981. Howard Trucking had been losing money, apparently, on its oil field hauling operations. Don M. Howard, Howard's president, decided to begin phasing out of this oil field hauling business and into the business of brokering oil field moving equipment. He was approached by John Stassi II. He asked Howard to sell the equipment to him and the doctors. He proposed to buy the equipment for approximately 1.25 million dollars and to operate it under Howard's Interstate Commerce Commission License, with Howard receiving a commission on Orleans-Iberia's

gross sales. Stassi asked Howard to structure the transaction as a series of leases rather than as sales and to assign the investment tax credits to the Sub-chapter Corporations owned by Stassi and the doctors. Stassi supplied form leases, and these leases were the instruments ultimately signed by the parties.

Orleans-Iberia was obligated to pay the full "purchase price" of the equipment from the inception of the contracts. The residual value was paid in advance rather than at the end of the "lease," and there was a mere $100 option to purchase this very valuable equipment at the end of the term of the lease.

A clause of the lease supplied by John Stassi provided the following in the event of default:

> The Lessor may without notice, but shall not be obligated to, sell all or any portion of the leased equipment at public or private sale, upon such terms as it may deem advisable. And in the event of any such sale the Lessor shall, in addition to other rights and remedies hereunder, be entitled to retain, as liquidated damages and not as penalty, all proceeds of such sale, and to recover from the Lessee as additional rents any

> deficiency with respect to the leased equipment sold determined as provided in paragraph 16 . . . (Emphasis added)

Furthermore, paragraph 16 provides:

> If the net sale proceeds from the sale of any equipment are less than the present value of rentals remaining unpaid for the leased term plus the Residual Value specified herein, and plus any other obligations of the Lessee to Lessor hereunder, the Lessee shall properly pay such amount to Lessor as additional rent . . . .

In addition to the protection of the foregoing Lease provisions, Howard demanded and received continuing guarantee agreements from each of the shareholders of the Lessee corporations, the defendants herein, pursuant to which they personally bound themselves to underwrite the performance of Orleans-Iberia under the leases. A clause in each of the four guarantee agreements provides as follows:

> The Undersigned also agrees that the written acknowledgment of the debtor of the judgment of any court establishing the amount due from the debtor shall be conclusive and binding on the Undersigned.

Seven of the leases were signed on October 5, 1981, and the eighth on January 5, 1982. Howard Trucking executed an "election" to treat the leases as purchases for federal investment tax credit purposes only, and to assign the tax credit to Orleans-Iberia, thereby giving Orleans-Iberia a double tax advantage: Orleans-Iberia could treat 100 percent of the lease payments as business expenses and therefore deduct them fully pursuant to the tax code (rather than capitalizing the assets and depreciating them over a period of years), and it could utilize the investment tax credit normally reserved to the owner of the equipment.

By February 19, 1982, Orleans-Iberia was in arrears in its payments, and on October 14, 1982, it filed a petition under Chapter 11 of the Bankruptcy Act. Exhibit B attached to the debtor's petition (exhibit A) contained a "STATEMENT OF DEBTOR'S ASSETS." The first asset listed was:

> (1) Leasehold interests in various motor vehicles and related equipment and Schedule attached to equipment lease attached hereto.

The same exhibit described "Debtor's Nature of Business" as follows:

> Debtor leases the motor trucks, trailers, and related equipment from Howard Trucking Company, Inc. as per Schedule 'A-1', and leases said equipment back to Howard Trucking Company, Inc. by owner-operator agreements pursuant to which Howard operates the equipment in connection with its business as a common carrier for hire. Debtor derives the gross income from the hire of said equipment by Howard less expenses relative thereto and is obligated to pay Howard a fixed monthly rent out of the net operating profit. As of September 20, 1982, Debtor, due to lack of resources and unwillingness of Howard to advance funds, was forced to curtail its business activities. The motor vehicles, trailers and related equipment are presently stored pending Debtor's formulation of a plan of reorganization and approval by the court.

The equipment itself was not listed as an asset of the debtor.

Approximately two weeks subsequent to Orleans-Iberia's filing in Bankruptcy Court, Howard Trucking filed the present suit on the continuing guarantee agreements against the four defendants named above and was met by the defendants' dilatory exception of prematurity based on failure

to discuss the assets of the principal debtor, Orleans-Iberia, which were protected by the automatic stay order issued by the Bankruptcy Court.

On November 18, 1982, at the first meeting of creditors, the testimony of John Stassi, President of Orleans-Iberia, is as follows:

> Orleans-Iberia leases a truck terminal from our [sic. Howard] Trucking Company and also leases a group of trucks and trailers for purposes of hauling oil field rigs and other heavy equipment. . .
>
> At the present time, the vehicles leased from Howard are stored through an arrangement, temporary arrangement with Howard at the terminal premises which the company leases from Howard.
>
> Howard has agreed to our mutual benefit to maintain the security and the preservation of the vehicles depending on the outcome of these proceedings and the formulation of the plan of these proceedings.
>
> As of the present time, however, the Company is not doing business . . .

Stassi's statement at the creditors' meeting also included the following:

> We have title to none of the vehicles, we only have lease rights with options to purchase if we pay out the lease.

On January 10, 1983, Howard Trucking filed an application to Compel Adoption or Rejection of Leases, in Bankruptcy Court, in which it asserted that Stassi's remarks at the first meeting of creditors provided little hope that Orleans-Iberia could cure its defaults and assure future performance under the Leases. In this application, Howard stated:

> Additionally, the equipment leases described above . . . are, in fact, a lease-purchase agreement . . .
>
> Due to the rapidly depreciating nature of the leased equipment, it is essential that this application be granted and that the time period given to the debtor to adopt or reject the lease be as brief as possible, and that the 15 day normal period for same be waived by the court in the interest of judicial efficiency as other motions are pending before the court for January 18, 1983, and the issues raised here in this application were also raised at the . . . meeting held on November 18, 1982.

Thereafter, on January 18, 1983, Judge Kingsmill ordered the leases rejected and ordered Howard Trucking to take the vehicles back.

By November 16, 1983, the administration of the bankrupt estate was closed with no distribution

whatsoever to the creditors. After the Bankruptcy Court ordered rejection of the leases and return of the property to Howard Trucking, it sold the equipment privately. Howard Trucking alleges it assumed the property was adjudicated to be in its ownership and therefore there was no statutory requirement for a judicial sale of the property in order to qualify for a deficiency judgment, which it requested in the proceeding in the lower court, since there was no debtor to be protected under the Deficiency Judgment Act. Accordingly, Howard Trucking contacted Nelson International and arranged for Nelson International to hold a public auction. After the auctioneer's commission and cost of advertising, the net proceeds of the sale on March 2, 1983, amounted to $491,851.12. The defendants moved for summary judgment based on the argument that the instruments underlying the guarantees are sales agreements, rather than leases, and that the Deficiency Judgment Act bars a repossessing creditor from suing for the deficiency absent a judicial sale of the repossessed property.

On May 9, 1984, the trial court denied the motion for summary judgment and stated the following:

> The agreement between the parties appears to have been intended as a lease, rather than an illegal conditional sale. The referee in Bankruptcy clearly sets out these agreements to the leases and there was no objection to that ruling.

Thereafter, on September 13, 1984, defendants filed a second motion for summary judgment arguing that they were not bound by the ruling of the Bankruptcy Court by either res judicata or collateral estoppel, and more importantly, the characterization of the transaction as a lease as stated by the trial court's judgment of May 9, 1984 is contrary to Louisiana jurisprudence. Thereafter, the trial court executed judgment granting the motion for a summary judgment.

We now turn to the initial issue of whether the trial court erred in determining there was no genuine issue of material fact. Louisiana Code of Civil Procedure article 966, in pertinent part, provides that a trial judge may grant a motion for

summary judgment if there are no genuine issues of material fact in dispute and movers are entitled to a judgment as a matter of law. Howard Trucking contends the material fact at issue was the intent of the parties in making the contract, whether they intended the contract to be a lease or a sale.

Article 967 of the Louisiana Code of Civil Procedure states that when a motion for summary judgment is made and supported by affidavits, an adverse party may not rest on the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided, must set forth specific facts showing there is a genuine issue for trial. It further states that if the party fails to do so, summary judgment is appropriately rendered against him. We find Howard Trucking failed to set forth any facts demonstrating the existence of a genuine issue of fact for trial. The trial court held, as a matter of law, the agreement was in the nature of a sale. The affidavits submitted by the plaintiff merely allege that John Stassi wanted to call the contracts between the plaintiff and Orleans-Iberia

leases for tax purposes and that Stassi supplied the printed lease forms which were signed by the parties. These facts were not contested by any party to the lawsuit and do not, in any event, bear upon the holding of the trial court. Therefore, from the record facts, we find the trial court did not err in determining there was no genuine issue of material fact for trial.

We now turn to decide whether the trial court erred in determining the defendants were entitled to judgment as a matter of law. The plaintiff points out the contract forms were entitled "lease"; they were structured as leases in accordance with the request of John Stassi, who was the president of Orleans-Iberia, Inc., and the tax attorney and a shareholder of that corporation. Furthermore, Orleans-Iberia did not list the equipment among its assets in Bankruptcy Court as it would have been obliged to do had the title to the equipment been with Orleans-Iberia as debtor. Moreover, as presented hereinabove, Stassi and counsel for Orleans-Iberia consistently refered to the

instruments as leases in the Orleans-Iberia bankruptcy proceedings. The Bankruptcy Court issued an order, acquiesced in by Orleans-Iberia and now final and unappealable, which order seems to assume the contracts between the parties were leases rather than purchases.

The defendants on the other hand, urge us to affirm the decision of the trial court's finding that the contracts between the parties were thinly disguised conditional sales. As stated by the court:

> In this case the residual value was paid in advance rather than at the end of the lease, so that it is the thinnest disguise for a downpayment. The so-called lease payments are clearly installments and the $100 option to purchase this very valuable equipment does not obscure the fact that this is a conditional sale agreement.

In appellate brief, the defendants point out the following:

> The total amount of 'rental payments' stipulated in the 'leasing agreements' was equal to the full agreed value of the equipment, less a $275,000 cash downpayment, with interest at 16.7 per cent per annum.
>
> A $275,000 cash downpayment was required for the contracts and was paid

> by Orleans-Iberia to plaintiff within 90 days of the October 5, 1981 closing.
>
> Orleans-Iberia was required to pay the full value of the equipment, plus 16.7 percent interest, whether or not it exercised the 'option' to purchase the equipment for $100 per 'lease.'

The defendants urge that the foregoing facts compel the conclusion that the transaction between the plaintiff and Orleans-Iberia was a credit sale. It is well-established that we are not bound by the label placed on a written agreement or the subjective intent of the contracting parties, but must look to the substance of the transaction in determining rights and obligations. Pastorek v. Lanier Systems Company, 249 So.2d 224 (La.App. 4th Cir. 1971). Words will have import and can be binding only when they describe relationships which actually exist, but not when they are merely labels which are used to alter or disguise actual relationships. Pastorek, supra.

We agree with the reasoning of the trial court, as stated in its reasons for judgment, that the parties in fact entered into a sale agreement, and

therefore, we find the trial court did not err in determining as a matter of law the defendants were entitled to summary judgment. See B.N.O. Leasing Corp. v. Hollins & Hollins, Inc., 448 So.2d 1329 (La.App. 5th Cir. 1984).

We now turn to decide whether the trial court erred by holding that the doctrine of res judicata was not applicable. We note the judgment of the Bankruptcy Court is a final judgment, which is not subject to appeal at this point; however, the thing adjudicated in the Bankruptcy Court judgment is different from that which was adjudicated in the state court, which is now on appeal. It is true the Bankruptcy Court's order of January 18, 1983 providing for the debtor's (Orleans-Iberia's) rejection of the leasehold in Bankruptcy Court, necessarily depended upon the court's assuming that the instruments in question were in fact leases and that title to the equipment was in Howard Trucking. The defendants allege the characterization of the transaction as a lease was essential to the order rejecting it, for only "executory contracts"

(including leases) may be rejected. 11 USC, Section 365.

We find, however, that the parties were treating the agreement as a lease, and the Bankruptcy Judge simply had no reason to question this. Clearly, it was not an issue in the bankruptcy proceeding; therefore, there is no judgment binding on this matter.

Howard Trucking further alleges the defendants should be estopped from collaterally attacking a Federal Court order recognizing title in Howard Trucking Company. Our jurisprudence clearly states Louisiana law does not recognize the doctrine of collateral estoppel. See Welch v. Crown Zellerbach Corp., 359 So.2d 454 (La.1978). Furthermore, and more significantly, the Bankruptcy Court never actually adjudged the transaction to be per se a lease rather than a sale. Moreover, under the doctrine of collateral estoppel, a decision in a prior forum on an issue of law is not binding in subsequent litigation between the same parties on a different cause of action; the doctrine applies only to

previously decided questions of fact. Shell Oil Company v. Texas Gas Transmission Corp., 176 So.2d 692 (La.App. 4th Cir. 1965). The Shell Oil court held that a determination as to the characterization of an agreement as a sale or a lease is a question of law. Thus, we find the doctrine of collateral estoppel cannot properly be invoked in this case.

Howard Trucking also contends the defendants are equitably estopped by their previous statements, made in Bankruptcy Court, from asserting the contract is one of sale. Equitable estoppel applies when the following elements are present:

> (1) A representation by word, action, or inaction; (2) justifiable reliance on the representation; and (3) a change in position to one's detriment because of the reliance. American Bank & Trust Company v. Trinity Universal Insurance Company, 205 So.2d 35, 40 (La.1967); Wilkinson v. Wilkinson, 323 So.2d 120, 126 (La.1975).

Equitable estoppel does not apply in this case because Howard Trucking was privy to all the same information that the defendants were aware of and thus it cannot be said that Howard Trucking

justifiably and innocently relied on the representation by the defendants. Both parties were equally aware of the circumstances surrounding the contractual agreement which they entered into, and were in equally good positions to determine the nature and characterization of this contract, be it sale or lease.

Finally, Howard Trucking argues the judicial confessions made by the defendants, as well as confessions made by them out of court, precludes them from now claiming protection under the Deficiency Judgment Act.

Louisiana Civil Code article 2291 sets out the binding effect of judicial confessions. Article 2291 provides:

> The judicial confession is the declaration which the party, or his special attorney in fact, makes in a judicial proceeding.
>
> It amounts to full proof against him who has made it.
>
> It cannot be divided against him.
>
> It cannot be revoked, unless it be proved to have been made through an error in fact.

> It cannot be revoked on a pretense of an error in law.

An earlier judicial admission does not in a subsequent proceeding bind a person making the same, nor does it estop him from denying the correctness thereof, unless the other party claiming the benefit of judicial estoppel resulting therefrom has been deceived by such judicial confession and has relied or acted thereon to his prejudice. Succession of Turner, 103 So.2d 91 (La.1958). Because we find the plaintiff did not rely to its detriment on judicial confessions made by the defendants during the bankruptcy proceedings, we find the trial court was correct in not recognizing the judicial confessions as full proof against the defendants.

For the reasons assigned, the judgment of the trial court is affirmed; all costs of this appeal are to be assessed against the appellant.

AFFIRMED.

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 273-546
c/w 273-547 DIVISION "K"

HOWARD TRUCKING CO., INC.

VS.

JOHN A. STASSI, II, ARNOLD M. LUPIN, ALAN N. JACOBS, ERNEST E. CHERRIE, JR., AND KENNETH N. ADATTO

FILED: October 29, 1984 /s/Karen McEvers
DEPUTY CLERK

JUDGMENT

This matter came for hearing on this 18th day of October, 1984 and submitted on briefs.

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed on behalf of the defendants' John Stassi, II, Ken Adatto, Arnold M. Lupin, Ernest E. Cherrie, Jr., and Alan N. Jacobs is granted as to the agreements concerning the movable equipment only.

JUDGMENT READ, RENDERED AND SIGNED IN GRETNA, LOUISIANA THIS 29th DAY OF OCTOBER, 1984.

/s/ Alvin Rudy Eason
JUDGE

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 273-546
c/w 273-547 DIVISION "K"

HOWARD TRUCKING CO., INC.

VS.

JOHN A. STASSI, II, ARNOLD M. LUPIN, ALAN N. JACOBS, ERNEST E. CHERRIE, JR., AND KENNETH N. ADATTO

FILED: October 29, 1984 /s/Karen McEvers
DEPUTY CLERK

REASONS FOR JUDGMENT

This case arises out of an alleged lease purchase agreement by which agreement plaintiff Howard Trucking Company "leased" to several corporations certain movables primarily heavy oil field trucks. The several corporations merged into Orleans-Iberia, Inc., which went into a reorganization bankruptcy. The defendants included John A. Stassi, II, and four other private individuals who signed as guarantors for the various

corporations, whose guaranty agreements are still in force and effect.

The principal issue in this second Motion for Summary Judgment is whether the lease and "closing memorandum" made on comtemporaneously [sic] when read in parri-materii [sic] are valid lease purchases or prohibited conditional sale agreements. The printed lease forms apparently provided by the defendants appear to be valid leases which could be enforced under Louisiana law.

The "closing memorandum" is another question. The closing memorandums in paragraph III that the residual value of the movable equipment covered by the leases is $275,100.00, $275,000.00 which is to be and apparently was paid during the first 3 months of the lease (lease payments were called for and apparently paid for these several months). After the $257,000.00 was paid and all lease payments were made, Orleans-Iberia, Inc. could purchase the equipment for the remaining $100.00 of the residuals. The title of the movables was to remain vested in the plaintiff Howard

Trucking Company until all lease payments were made.

In fact, when Orleans-Iberia went into bankruptcy, the referee ordered the movables to be returned to defendant Howard Trucking Company. Howard Trucking Company thereafter proceeded to a non-judicial sale of the movables. Howard Trucking Company now in these proceedings is attempting to collect the deficiency between the sale price, and the amounts specified in the movables lease on an amount of some $931,000.00 plus 1-1/2 interest and attorney's fees.

This court in an earlier decision on a Summary Judgment on this same issue determined that leases were valid and collectable as a matter of law.

On March 13, 1984, the case of BNO Leasing Corporation Vs. Hollins & Hollins, Inc. was handed down by the La. Fifth Circuit Court of Appeals [sic] reported in 448 So. 2d 1329 which was published on June 6, 1984 in West's Louisiana Cases.

The defendants refiled their motion suggesting to this court that the La. Fifth Circuit Court of Appeals [sic] ruling was binding on this court.

Although there are some minor differences in the status of the parties and lease terms between the instant case and BNO Vs. Hollins & Hollins, supra, this court grants the Motion for Summary Judgment as to No. 273-546 concerning the movables (not as to the consolidated case #273-547 between the same parties, but involving the lease of immovable property).

As then Judge Lemmon of the 4th Circuit Court of Appeals [sic] (now Justice Lemmon) said in Pastoreck [sic] Vs. Lanier Systems Company, 249 So.2d 224 (4th C.C.A. 1971):

> "We are bound to find the relationships as they exist and not simply as they have been described."

In this case the residual value was paid in advance rather than at the end of the lease, so that it is the thinnest disguise for a down payment. The so called lease payments are clearly installments and the $100.00 option to purchase this very valuable equipment does not obscure the fact that this is a conditional sale agreement.

GRETNA, LOUISIANA THIS 29th DAY OF OCTOBER, 1984.

/s/Alvin Rudy Eason
JUDGE

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 273-546
c/w 273-547 DIVISION "K"

HOWARD TRUCKING CO., INC.

VS.

JOHN A. STASSI, II, ARNOLD M. LUPIN, ALAN N. JACOBS, ERNEST E. CHERRIE, JR., AND KENNETH N. ADATTO

FILED: May 9, 1984 /s/Karen McEvers
DEPUTY CLERK

JUDGMENT ON MOTION FOR
SUMMARY JUDGMENT

This matter came for hearing on this 19th day of April, 1984 and taken under advisement.

ATTORNEYS:
David R. Richardson
Ralph [Hubbard]
Attorneys for Plaintiff

Lawrence D. Wiedemann
Roger A. Stetter
Attorneys for Defendants

When after reviewing the documents presented herein;

IT IS ORDERED, ADJUDGED AND DECREED that the defendants' Motion for Summary Judgment is denied.

The agreement between the parties appears to have been intended as a lease, rather than an illegal contional [sic] sale. The referee in Bankruptcy clearly sets out these agreements to the leases and there was no objection to that ruling.

Judgment read, rendered and signed in Gretna, Louisiana this 9th day of May, 1984.

/s/ Alvin Rudy Eason
JUDGE

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
KINGSMILL, J.
JANUARY 18, 1983

IN THE MATTER OF	NUMBER
ORLEANS-IBERIA, INC.	82-02161K
DEBTOR	REORGANIZATION CHAPTER 11

This matter came before the Court this date to consider the following:

1) Application of Howard Trucking Company, Inc. to compel adoption or rejection of leases on certain vehicles, oilfield equipment and realty (A terminal station);

2) Motion of Howard Trucking Company, Inc. to appoint a trustee; and

3) Motion of Howard Trucking Company, Inc. to convert this proceeding to Chapter 7.

PRESENT:

Douglas Dodd,
Substituting for Phillip Wittmann,
Attorney for Debtor

John Stassi,
President of Debtor Corporation

James Roy,
Attorney for Howard Trucking

Robert G. Stassi,
Attorney for SRS, Inc.

David Rubin,
Attorney for Fidelity Bank

Considering the statements of counsel, the testimony of John Stassi as president of the debtor corporation, the evidence and the law,

IT IS ORDERED that the application of Howard Trucking Company, Inc. to compel adoption or rejection of leases on certain vehicles, oilfield equipment and realty (a terminal station) as fully described in said application, be and it is hereby GRANTED.

IT IS FURTHER ORDERED that the leases on certain vehicles, oilfield equipment and realty (a terminal station) as fully described in said application, be and they are hereby REJECTED.

IT IS FURTHER ORDERED that Howard Trucking Company, Inc. be and it is hereby authorized to take immediate possession of said property and the debtor is to cooperate fully so that an orderly transition of the vehicles, oilfield equipment and realty can be made to Howard Trucking Company, Inc. within ten (10) days.

The Court will defer its ruling on the motion of Howard Trucking to appoint a trustee and the motion to convert this proceeding to Chapter 7 as debtor is to file a voluntary conversion.

New Orleans, Louisiana, January 18, 1983.

/s/T. H. Kingsmill, Jr.
BANKRUPTCY JUDGE

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE # 49

FROM: CLERK OF THE SUPREME COURT OF LOUISIANA

On the 9th day of May, 1986, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARING GRANTED:

84-C-1699 Sharon Chrier v. Thomas S. Whitecloud, III, M.D., et al

REHEARINGS DENIED:

* * * * * * * * * *

85-C-1972 Howard Trucking Co., Inc. v. John A. Stassi, II, et al
DENNIS & LEMMON, J. J., would grant a rehearing.

85-C-2113 Bennet W. Jardell, et al v. Hillin Oil Co., et al
WATSON & LEMMON., J.J., would grant a rehearing.

85-C-2146 Julian L. Steinberg, et al v. Emile Meyers, et al

Supreme Court, U.S.
FILED
OCT 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-205

In the Supreme Court of the United States

October Term, 1986

HOWARD TRUCKING COMPANY, INC.,

Petitioner,

v.

CORRECTED COPY

JOHN A. STASSI, II, ARNOLD M. LUPIN, ALAN N. JACOBS, ERNEST E. CHERRIE, JR. AND KENNETH N. ADATTO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

RESPONDENTS' BRIEF IN OPPOSITION

LAWRENCE D. WIEDEMANN
WIEDEMANN & FRANSEN
821 Baronne Street
New Orleans, Louisiana 70113
(504) 581-6180
Counsel for Respondent,
John A. Stassi, II

WILLIAM R. FORRESTER, JR.
ROGER A. STETTER
LEMLE, KELLEHER, KOHLMEYER, DENNERY, HUNLEY, MOSS & FRILOT
2100 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
(504) 586-1241
Counsel for Respondents,
Arnold M. Lupin, Alan N. Jacobs, Ernest E. Cherrie, Jr. and Kenneth N. Adatto

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Statement of the Case	2
1. Statement of Facts	2
2. Proceedings Below	3
Reasons for Denying the Writ	7
Conclusion	10
Certificate of Service	12

TABLE OF AUTHORITIES

CASES:	Page
Heiser v. Woodruff, 327 U.S. 726 (1946)	9
Justice v. Caballero, 393 So.2d 866 (La.App. 4th Cir. 1981)	10
Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923)	10
Myers v. Int'l Trust Co., 263 U.S. 64 (1923)	9
Rice v. Sioux City Cemetery, 349 U.S. 70 (1955)	10
Stoll v. Gottlieb, 305 U.S. 165 (1938)	9
STATUTES:	
Louisiana Deficiency Judgment Act, LSA—R.S. §§ 13:4106-07 (West 1968)	2
Louisiana Lease of Movables Act LSA-R.S. §§ 9:3301 *et seq.* (West 1986 P.P.)	9
Act 489 of 1986, enacting La. R.S. § 13:4108.1	10

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

No. 86-205

HOWARD TRUCKING COMPANY, INC.,

Petitioner,

v.

JOHN A. STASSI, II, ARNOLD M. LUPIN, ALAN N. JACOBS, ERNEST E. CHERRIE, JR. AND KENNETH N. ADATTO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

RESPONDENTS' BRIEF IN OPPOSITION

This brief is respectfully submitted on behalf of respondents, John A. Stassi, II, Arnold M. Lupin, Alan N. Jacobs, Ernest E. Cherrie, Jr. and Kenneth N. Adatto (hereafter "defendants"), in opposition to the petition of Howard Trucking Company, Inc. (hereafter "plaintiff") for a writ of certiorari to review the opinion of the Supreme Court of Louisiana in this case, which is reported at 485 So.2d 915 (1986).[1]

[1] The opinion of the Court of Appeal, Fifth Circuit, State of Louisiana, is reported at 474 So.2d 955 (1985), and a correct copy of the judgment and unreported opinion of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, is attached hereto.

STATEMENT OF THE CASE

1. *Statement of Facts*

This suit was filed by plaintiff on October 25, 1982 to collect money allegedly owed to it by Orleans-Iberia, Inc. from the latter's guarantors, who are the named defendants herein. The petition alleges that plaintiff "leased" certain vehicles and oilfield hauling equipment (hereafter "the equipment") to Orleans-Iberia, Inc. and several corporations that merged into Orleans-Iberia, Inc. (hereafter referred to collectively as "Orleans-Iberia"), and that defendants, who signed as guarantors for the various corporations, are liable for all installments of "rent" allegedly owed by Orleans-Iberia under the claimed leases.

On October 19, 1982, Orleans-Iberia invoked bankruptcy proceedings by filing a petition for relief under Chapter 11 of the Bankruptcy Code, entitled *In re: Orleans-Iberia, Inc., Debtor,* No. 82-02161 K on the docket of the United States Bankruptcy Court for the Eastern District of Louisiana. During the Chapter 11 proceedings, plaintiff successfully petitioned the Bankruptcy Court for a return of the equipment included under the various contracts, and thereafter sold it at a nonjudicial sale without appraisal.

Plaintiff then attempted in this action to collect the deficiency between the net private sale price of the equipment and the amounts specified in the "lease agreements" it made with Orleans-Iberia. The trial court granted a motion by defendants for summary judgment, holding that the contracts in issue were not leases but conditional sale agreements and that plaintiff, by conducting a nonjudicial sale of the equipment without appraisal, had waived its right to a deficiency judgment by failing to comply with the requirements of the Louisiana Deficiency Judgment Act (hereafter the "Act"), LSA-R.S. §§ 13:4106-07. The

judgment of the trial court was affirmed on appeal to the Fifth Circuit Court of Appeal and, again, on writs to the Supreme Court of Louisiana.

2. *Proceedings Below*

This case represents yet another attempt to transform a sale into a lease by switching the label in contravention of well-established Louisiana law. Throughout the course of this litigation, plaintiff's position has been that because the parties to the underlying transaction called their agreement a "lease," the courts should be forever bound by that label. In opposing defendants' motion for summary judgment, plaintiff filed counter-affidavits by its president, accountant, and negotiator to the effect that defendant John A. Stassi wanted to call the contracts between plaintiff and Orleans-Iberia leases for tax purposes and that he also supplied printed lease forms that were signed by the parties to the transaction. Plaintiff's president, John Howard, on the other hand, allegedly "expressed indifference about whether the transaction was called a sale or a lease as long as he was asssured of getting his money." (Pl's "Original Brief on the Merits," filed in the Supreme Court of Louisiana, at 3)

The Louisiana courts rejected plaintiff's position since it ignores the crucial point that, whatever either or both of the parties wanted, their contract must be construed and given effect in accordance with Louisiana law. As was stated by the Fifth Circuit Court of Appeal in its opinion affirming the judgment of the trial court in this case:

> ...The trial court held, as a matter of law, the agreement was in the nature of a sale. The affidavits submitted by the plaintiff merely allege that John Stassi wanted to call the contracts

between the plaintiff and Orleans-Iberia leases for tax purposes and that Stassi supplied the printed lease forms which were signed by the parties. These facts were not contested by any party to the lawsuit and do not, in any event, bear upon the holding of the trial court. Therefore, from the record facts, we find the trial court did not err in determining there was no genuine issue of material fact for trial.

* * *

...It is well-established that we are not bound by the label placed on a written agreement or the subjective intent of the contracting parties, but must look to the substance of the transaction in determining rights and obligations. *Pastorek v. Lanier Systems Company,* 249 So.2d 224 (La. App. 4th Cir. 1971). Words will have import and can be binding only when they describe relationships which actually exist, but not when they are merely labels which are used to alter or disguise actual relationships. *Pastorek, supra.*

We agree with the reasoning of the trial court, as stated in its reasons for judgment, that the parties in fact entered into a sale agreement, and therefore, we find the trial court did not err in determing as a matter of law the defendants were entitled to summary judgment. See *B.N.O. Leasing Corp. v. Hollins & Hollins, Inc.,* 448 So.2d 1329 (La. App. 5th Cir. 1984).

474 So.2d at 959-60. Likewise, the Supreme Court of Louisiana held that the contracts between plaintiff and Orleans-Iberia were quite clearly conditional sales and that plaintiff waived the right to recover a deficiency judgment against defendant guarantors due to its admitted failure to comply

with the requirements of the Act. In particular, speaking through its Chief Justice, the Court noted that the Act "embodies a firm public policy of this state and requires strict adherence," and concluded that:

> We decline to override the long and consistent jurisprudence finding appraisal an absolute prequisite to a deficiency judgment.

485 So.2d at 919.

Despite the time-honored rule that this Court does not sit to review matters of state law, in its petition for a writ of certiorari, plaintiff once again asserts that the transaction between plaintiff and Orleans-Iberia was a "lease" based on the specious and totally unsupported argument that the label used by the parties to describe their relationship, rather than the substance of what they agreed upon, should determine their legal rights and obligations. (Petition at 7, 26-28)

In another variation of that same argument, plaintiff again also contends that defendants should not have been allowed to show that the underlying transaction was in fact a credit sale because plaintiff and Orleans-Iberia referred to it as a "lease" in the Bankruptcy Court, and the Bankruptcy Judge (Judge Kingsmill) used the same label in rejecting the contracts as a burden on the debtor's estate. (Minute Entry dated January 18, 1983, App. to Petition at 45a) However, neither plaintiff nor Orleans-Iberia asked the Bankruptcy Judge to decide who had title to the equipment, so that the issue was never even litigated in the Orleans-Iberia bankruptcy proceeding. The Fifth Circuit Court of Appeal aptly summed the matter up as follows:

> We find, however, that the parties were treating the agreement as a lease, and the Bankruptcy Judge simply had no reason to question this. Clearly, it was not an issue in the bankruptcy proceeding; therefore, there is no judgment binding on this matter.

474 So.2d at 960.

Lastly, plaintiff argued below, and again suggests in its writ application to this Court, that it was misled by the use of the "lease" label in the bankruptcy proceeding. (Petition at 26-28) Yet, plaintiff was represented by predecessor counsel at the October 5, 1981 closing of the sale of the equipment, in the guise of the so-called leases, and at every subsequent stage of this matter. Plaintiff therefore knew, or is presumed to have known, that the so-called "Leasing Agreements" were credit sales under the long settled jurisprudence of Louisiana. Again, as noted in the opinion of the Supreme Court of Louisiana, the Fifth Circuit Court of Appeal went to the crux of the matter in holding that:

> Equitable estoppel does not apply in this case because Howard Trucking was privy to all the same information that the defendants were aware of and thus it cannot be said that Howard Trucking justifiably and innocently relied on the representation by the defendants. Both parties were equally aware of the circumstances surrounding the contractual agreement which they entered into, and were in equally good positions to determine the nature and characterization of this contract, be it sale or lease.

474 So.2d at 961; 485 So.2d at 918.

We submit that the opinion below is firmly grounded in Louisiana law (as it existed when this case was decided) and, more importantly from the perspective of this Court, that it does not pose any conflict whatever with federal law and therefore should not be called up for review by this Court.

REASONS FOR DENYING THE WRIT

Plaintiff argues that a writ of certiorari should be granted in this case because the Bankruptcy Court's order rejecting the contracts between plaintiff and Orleans-Iberia constituted a final adjudication, binding on the defendants to this action, that the transaction was a lease rather than a credit sale. Even more implausibly, and without any support either in the record of this case or the applicable law, plaintiff contends that, "In Louisiana, the state Supreme Court has asserted that it is free to ignore the final ruling of the federal bankruptcy judge — a holding by that court which flies in the face of the United States Constitution itself." (Petition at 25)

The central point in this case, and the obvious answer to plaintiff's argument, is that the transaction between Orleans-Iberia and plaintiff was unmistakably a credit sale, and any reasonable person would have to recognize it as such under Louisiana law. To conclude nevertheless — as plaintiff has repeatedly without success urged the courts to do — that the transaction should be deemed a lease because both plaintiff and Orleans-Iberia referred to it as such in the Bankruptcy Court, and Judge Kingsmill used the same label in rejecting the contracts as a burden on the debtor's estate, is to elevate form over substance. The issue of title to the equipment was not presented to Judge Kingsmill or litigated in the

bankruptcy proceeding; rather, as stated by the Fifth Circuit Court of Appeal, "[T]he parties were treating the agreement as a lease, and the Bankruptcy Judge had no reason to question this."

As noted in the opinion of the Supreme Court of Louisiana, "Whether the contract was a lease or a sale does not depend on what defendants called it." 485 So.2d at 918. That is precisely the point. No matter how often the parties to the underlying transaction might call it a "lease," under the well-settled jurisprudence of Louisiana, it was always and unmistakably a credit sale. A sale cannot be transformed into a lease by switching the label, nor does a creditor obtain the right to disregard the safeguards of the Act because a busy bankruptcy judge, who has never even been asked to decide the issue of title, adopts the label used by the parties and appearing on the face of an instrument in connection with his ruling on an entirely different matter. Again, as noted by the Fifth Circuit Court of Appeal in this case, "... the Bankruptcy Court never actually adjudged the transaction to be per se a lease rather than a sale." 474 F.2d at 960.

Thus, it makes no difference whether one applies Louisiana law, federal law or, one suspects, the law of Timbuctu in assessing the impact of Judge Kingsmill's order on the parties to this action. The Bankruptcy Court order is simply irrelevant to the rights of the parties in this case and was accorded all the "full faith and credit" that it deserved. Plaintiff's argument is without merit since it conveniently overlooks both the substance of what the parties in fact agreed upon and the reality that Judge Kingsmill's order was nothing more nor less than a holding that the contracts between plaintiff and Orleans-Iberia should not be maintained for the benefit of general creditors.

In short, just as the label used by plaintiff and Orleans-Iberia to describe their relationship was false, the

basis for review of the decision below claimed by plaintiff is also false. That decision is perfectly compatible with federal law and, in fact, the petition does not even present a colorable federal question supporting the exercise of jurisdiction by this Court.[2]

A final word should be said regarding the petition for a writ of certiorari. Plaintiff suggests that this Court should grant review because the Supreme Court of Louisiana's opinion in this case "jeopardizes the rights of future litigants" and raises important issues of public policy and bankruptcy law. (Petition at 20, 23-28) In fact, quite the opposite is true. This case is important only to the immediate parties and, indeed, is now mainly of historical interest even in Louisiana. As noted in the Supreme Court's opinion, in 1985, the Louisiana Legislature amended and reenacted the Lease of Movables Act to provide that financed leases of movable property, which were previously construed in Louisiana as prohibited conditional sales transactions, "shall have the same effect as true leases for purposes of Louisiana law." 485 So.2d at 917 & n.4, citing LSA-R.S. § 3310(B). Moreover, this year, the Louisiana Deficiency Judgment Act was also amended and reenacted to provide that a debtor and creditor may agree to a private sale of the debtor's property without appraisal, while reserving the creditor's right to collect a deficiency

---

[2] Plaintiff's contention that past decisions of this Court, applying federal rules of res judicata and collateral estoppel to the orders and judgments of bankruptcy courts, are in conflict with the decision below is simply incorrect. In all of the cases relied upon by plaintiff, this Court emphasized that the former judgment or order which bound the parties in subsequent litigation was based upon an actual trial of contested issues and a real decision on those issues by the earlier tribunal. *Heiser v. Woodruff*, 327 U.S. 726 (1946); *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Myers v. Int'l Trust Co.*, 263 U.S. 64 (1923). Since Judge Kingsmill's order in the Orleans-Iberia bankruptcy proceeding possessed none of these attributes, the Louisiana courts rightly held it did not prevent either party to this action from fully and fairly litigating the true nature of the contracts, as in fact occurred.

judgment if the sale proceeds are less than the agreed value of the property. Act 489 of 1986, enacting La. R.S. § 13:4108. Again, this legislation is contrary to prior Louisiana law which held that the Act's protection could not be waived even in the situation where the debtor had authorized the creditor to sell the property "as he sees fit" and to apply the sale proceeds to the outstanding indebtedness. *See, e.g., Justice v. Caballero,* 393 So.2d 866, 867 (La. App. 4th Cir. 1981). In view of these legislative developments, the decision in this case should have virtually no impact on future litigants in Louisiana. Rather, it is only important to the immediate parties, furnishing yet another reason why the petition for a writ of certiorari should be denied. *See, e.g., Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetery,* 349 U.S. 70, 79 (1955).

CONCLUSION

Plaintiff has failed to show that a genuine issue of federal law exists warranting review of the decision below by this Court. This is simply another case in which a party to an agreement described as a "lease" but in reality a credit sale is making a futile attempt to overcome the effect of well-established Louisiana law. All of plaintiff's arguments are essentially variations on the same theme: that the contracts between the parties to the underlying transaction were not sales because they were called "leases" by plaintiff and Orleans-Iberia until issue was joined by the parties to this action. But neither the courts nor the defendants are bound by past labels — anymore than plaintiff would have been if it had sued defendants under a proper pleading and not resorted to a private sale of Orleans-Iberia's property. Looking to the substance of

this matter, it is clear that the contracts in issue were credit sales under Louisiana law and that plaintiff conducted a nonjudicial sale without appraisal of Orleans-Iberia's property, without the sanction of any court or the consent of anyone — either the principal debtor or the defendant guarantors. Plaintiff's suit for a deficiency judgment was therefore properly held barred under the Louisiana Deficiency Judgment Act.

Three courts have now rejected plaintiff's arguments, including the trial court, a unanimous panel of the Fifth Circuit Court of Appeal, and the Louisiana Supreme Court in an opinion by its Chief Justice. The opinions below demonstrate that plaintiff's claim that it has been denied "rights granted to it by a federal bankruptcy judge" (Petition at 10) is without merit, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

LAWRENCE D. WIEDEMANN
WIEDEMANN & FRANSEN
821 Baronne Street
New Orleans, Louisiana 70113
(504) 581-6180
Counsel for Respondent,
John A. Stassi, II

WILLIAM R. FORRESTER, JR.
ROGER A. STETTER
LEMLE, KELLEHER, KOHLMEYER,
DENNERY, HUNLEY, MOSS & FRILOT
2100 Pan American Life Center
601 Poydras Street
(504) 586-1241
Counsel for Respondents,
Arnold M. Lupin, Alan N. Jacobs,
Ernest E. Cherrie, Jr.
and Kenneth N. Adatto

Dated: New Orleans, Louisiana
October 19, 1986

CERTIFICATE OF SERVICE

I hereby certify that three copies of Respondents' Brief in Opposition were served by mail on counsel for petitioner, Hon. Mack E. Barham, Esq., this 19th day of October, 1986.

/s/ WILLIAM R. FORRESTER, JR.

DIV. K

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 273-546
c/w 273-547

DIVISION "K"

HOWARD TRUCKING CO., INC.

VS.

JOHN A. STASSI, II, ARNOLD M. LUPIN, ALAN N. JACOBS, ERNEST E. CHERRIE, JR., AND KENNETH N. ADATTO

FILED: October 29, 1984 /s/ Karen McEwen
DEPUTY CLERK

J U D G M E N T

This matter came for hearing on this 18th day of October, 1984 and submitted on briefs.

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed on behalf of the defendants' John Stassi, II, Ken Addato, Arnold M. Lupin, Ernest E. Cherrie, Jr., and Alan N. Jacobs is granted as to the agreements concerning the movable equipment only.

JUDGMENT READ, RENDERED AND SIGNED IN GRETNA, LOUISIANA THIS 29th DAY OF OCTOBER, 1984.

/s/ Robert Murphy Foster
JUDGE

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE.
Karen Mc Ewen

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 273-546
c/w 273-547

DIVISION "K"

HOWARD TRUCKING CO., INC.

VS.

JOHN A. STASSI, II, ARNOLD M. LUPIN, ALAN N. JACOBS, ERNEST E. CHERRIE, JR. AND KENNETH N. ADATTO

FILED: October 29, 1984 /s/ Karen McEwen
DEPUTY CLERK

REASONS FOR JUDGMENT

This case arises out of an alleged lease purchase agreement by which agreement plaintiff Howard Trucking Company "leased" to several corporations certain movables primarily heavy oil field trucks. The several corporations merged into Orleans-Iberia, Inc., which went into a reorganization bankruptcy. The defendants included John A. Stassi, II, and four other private individuals who signed as guarantors for the various corporations, whose guaranty agreements are still in force and effect.

The principal issue in this second Motion for Summary Judgment is whether the lease and "closing memorandum" made on contemporaneously when read in parri-materii are valid lease purchases or prohibited conditional sale agreements. The printed lease forms apparently provided by the defendants appear to be valid leases which could be enforced under Louisiana Law.

The "closing memorandum" is another question. The closing memorandums provide in paragraph III that the residual value of the movable equipment covered by the leases is $275,100.00, $275,000.00 which is to be and apparently was paid during the first 3 months of the lease (lease payments were called for and apparently paid for these several months). After the $275,000.00 was paid and all lease payments were made, Orleans-Iberia, Inc. could purchase the

equipment for the remaining $100.00 of the residuals. The title of the movables was to remain vested in the plaintiff Howard Trucking Company until all lease payments were made.

In fact, when Orleans-Iberia, Inc. went into bankruptcy, the referee ordered the movables to be returned to defendant Howard Trucking Company. Howard Trucking Company thereafter proceeded to a non-judicial sale of the movables. Howard Trucking Company now in these proceedings is attempting to collect the deficiency between the sale price, and the amounts specified in the movables lease on an amount of some $931,000.00 plus 1½ interest and attorney's fees.

This court in an earlier decision on a Summary Judgment on this same issue determined that leases were valid and collectable as a matter of law.

On March 13, 1984, the case of BNO Leasing Corporation Vs. Hollins & Hollins, Inc. was handed down by the La. Fifth Circuit Court of Appeals reported in 448 So.2d 1329 which was published on June 6, 1984 in West's Louisiana Cases.

The defendants refiled their motion suggesting to this court that the La. Fifth Circuit Court of Appeals ruling was binding on this court.

Although there are some minor differences in the status of the parties and lease terms between the instant case and BNO Vs. Hollins & Hollins, supra, this court grants the Motion for Summary Judgment as to No. 273-546 concerning the movables (not as to the consolidated case #273-547 between the same parties, but involving the lease of immovable property).

As then Judge Lemmon of the 4th Circuit Court of Appeals (now Justice Lemmon) said in Pastoreck Vs. Lanier Systems Company, 249 So.2d 224 (4th C.C.A. 1971):

> "We are bound to find the relationships as they exist and not simply as they have been described."

In this case the residual value was paid in advance rather than at the end of the lease, so that it is the thinnest disguise for a down payment. The so called lease payments are clearly installments and the $100.00 option to purchase this very valuable equipment does not obscure the fact that this is a conditional sale agreement.

GRETNA, LOUISIANA THIS 29th DAY OF OCTOBER, 1984.

JUDGE